WASHINGTON POST PAGE A13 DATE 19 Apr

Robert McClory

An Unreasonable Bill On Reasonable Searches

I read with interest The Post's April 14 editorial regarding a bill to regulate national security electronic surveillance. However, the editorial confused a number of key issues, and by that confusion came to a less than proper conclusion.

It is true that past administrations have "insisted that there is a constitutional difference between searches for intelligence data and for evidence of a crime," and therefore no warrant is required to authorize the former. But one must go on to note that three U.S. courts of appeals—the only ones to have directly ruled on this issue—have confirmed that a warrant is not a prerequisite to the gathering of foreign intelligence. The Fourth Amendment does not itself require a warrant in all cases. Rather, it ensures "the right of the people to be secure . . . against unreasonable searches and seizures." The issue then becomes what is reasonable in the foreign-intelligence arena.

The writer, a representative from Illinois, is the ranking Republican on the Judiciary Committee and the Intelligence Committee's legislation subcommittee.

When the executive branch is truly acting to gather foreign intelligence, even without a warrant it is acting within Fourth Amendment proscriptions because it is doing something that is constitutionally reasonable. The Fourth Amendment was adopted as a reaction to the wide-open, general searches allowed under the British writs of assistance and general warrants. Those writs, which were first issued to enforce import restrictions, were ultimately used by the British government to repress political dissent of Englishmen in the colonies.

The Fourth Amendment, adopted soon after our Constitution was ratified, was framed to prevent the new central government from acting in an overbearing fashion to quell domestic political activities. It was never contemplated that that restriction would be used to inhibit executive branch actions in the international sphere. As Judge Albert V. Bryan Jr. stated in his recent opinion in the Humphrey/Truong espionage case, to require a warrant for foreign-intelligence electronic surveillance "would frustrate the president's ability to conduct affairs in a manner that best protects the security of our government."

Because our government needs accurate information to protect our country from the hostile acts of foreign powers, it is necessary to engage in electronic surveillance of the agents of such powers. That is true if the agents are foreigners, as well as in the rare situation that an American citizen is working clandestinely for a foreign power. It would be inappropriate to go beyond the Fourth Amendment mandate by requiring a judicial role in such matters, for the issues involved are not susceptible to right-or-wrong, judicial-type reasoning.

Decisions in this area demand complex trade-offs and difficult balancing of priorities. Again quoting Judge Bryan, "It is not at all certain that a judicial officer, even an extremely well-informed one, would be in a position to evaluate the threat posed by certain actions undertaken on behalf of or in collaboration with a foreign state."

As envisioned by the framers of our Constitution, the legislative and executive were to be the political branches, subject to the electorate from time to time. On the other hand, the framers insulated the judicial branch from political considerations by granting judges life tenure. The former two are to formulate policies, while the courts are assigned the task of resolving cases and controversies by making reference to those policies. That structure should be abided by—and with particular good reason—in the area of national security. As Justice Jackson wrote for the Supreme Court in *Chicago Southern v. Waterman Steamship Company*, the issues involved "are delicate [and] complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil."

Finally, it should be seen that by shifting from the president to the judiciary the responsibility to authorize foreign-intelligence electronic surveillance, the courts become a buffer to executive accountability. If an intelligence agency wants to use electronic surveillance for an improper purpose, an application can be made to a court for authorization. The worst that can happen during the secret proceeding is that the application will be denied. But, it appears inevitable that some judges—perhaps by granting too much deference to the intelligence community—might give approval to abusive actions. No matter how clear the mistake might appear upon a more detailed analysis, no executive branch official could be called to task for the abuse. Anyone questioned need only make use of the court order as a shield.

Taking Exception

The legislative branch is the proper arm of government to serve as a check on executive discretion in this area. Indeed, President Carter endorsed the concept of strong congressional oversight when he backed the creation in both the House and Senate of the intelligence committees. Adequate privacy protection can be provided without resort to the courts by a law that would explicitly regulate when the government could engage in foreign-intelligence electronic surveillance. Compliance with those statutory provisions would be monitored by the congressional intelligence committees, and anyone found to have committed a violation would be subject to civil and criminal liability. That approach, embodied in an alternative measure that I have sponsored (H.R. 9745), would better balance the right of Americans to be protected from overreaching activities of their own government and from the activities of any foreign governments that could be inimical to the very existence of the United States.